

Service Date: September 20, 2000

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

IN THE MATTER of the Investigation of	)	UTILITY DIVISION
Wilder Resorts, Inc., d/b/a Fairmont Hot Springs	)	
Resort, Compliance with Public Utility Obligation	)	DOCKET NO. D99.4.86
To File Tariffs for Water Service to its Customers	)	ORDER NO. 6162f

**ORDER ON RECONSIDERATION *NUNC PRO TUNC***

**Background**

1. The Montana Public Service Commission (Commission) issued Order No. 6162 in Docket No. D99.4.86 on April 27, 1999, compelling Wilder Resorts, Inc., d/b/a Fairmont Hot Springs Resort (Fairmont) to come into compliance with public utility law as set forth in Title 69, Chapter 3, Montana Code Annotated (MCA). The Commission directed Fairmont to file its initial rates for approval by the Commission on or before May 28, 1999, and to rebate payments made pursuant to "illegal charges," i.e., rates and charges made before the Commission's approval of rates.

2. On May 21, 1999, Fairmont filed a Motion for Reconsideration of Order No. 6162, requesting an extension of time to file its initial rate application. Fairmont also requested reconsideration of the portion of the order indicating that any rates charged before the approval of the proposed tariffed rates and schedules were *prima facie* illegal. On May 25, 1999, the Commission granted the extension until July 30, 1999 to file the initial proposed rates, but deferred action on the request for reconsideration of the direction to rebate payments made before Fairmont's initial filing.

3. Fairmont again requested an extension of time to file the application on July 21, 1999. The Commission granted the request, extending the deadline.

4. On August 16, 1999, Fairmont filed its application for authority to implement initial rates and charges for water services and requested interim rate relief. The Commission denied Fairmont's request for interim rate relief on October 29, 1999.

5. Montana Consumer Counsel (MCC), Fairmont Homeowners Association (Homeowners), Fairmont Estates Condominium Association (Condos), Fairmont RV Park (RV Park), and Daniel Berube, Individual, intervened in the docket. All parties except the RV Park filed testimony, participated in the proceedings and entered into settlement discussions.

6. On April 25, 2000, the Commission conducted a duly noticed public hearing in Anaconda. The Intervenor MCC, Homeowners, Condos, and Mr. Berube were present, as was Fairmont. The RV Park did not appear at the hearing and was dismissed as an intervenor. Fairmont presented a Stipulation on the record agreed to by the Intervenor, and there were no objections to the stipulation at the hearing.

7. The Commission issued Order No. 6162d, Final Order Approving Initial Rates, on May 10, 2000, approving the Stipulation Agreement and incorporating the Stipulation in which the parties agreed to the annual revenue requirement of \$87,000 and the allocated cost of service rate design.

8. On August 31, 2000, the Commission received a letter from the counsel for a previous owner of the RV Park, inquiring as to whether Fairmont should have refunded any of the payments made for charges for water services rendered before the filing of initial rates for approval.

9. At its duly noticed work session on September 19, 2000, the Commission granted Fairmont's May 21, 2000 Motion for Reconsideration, *nunc pro tunc*, as if it had been incorporated into the Final Order, as set forth in the following Findings, Conclusions and Order.

#### **Findings of Fact**

10. On May 21, 2000, Fairmont promptly requested reconsideration of the portion of the order determining that the rates charged to customers before the approval of the proposed tariffed rates were *prima facie* illegal and that Fairmont should rebate past payments. The Commission deferred its determination on reconsideration, and then the issue was not raised again in the Docket, nor was it addressed in the Final Order.

11. In its Brief on the Motion for Reconsideration, Fairmont contended that it would be unjust and unreasonable to require Fairmont to rebate payments for water before Fairmont came into compliance with public utility law and made its filing with the Commission. Fairmont maintained that it had possessed a good faith belief that it was not subject to public utility law.

Fairmont had been in the business of running a resort that encompassed all the activities since separated out into competing business interests. At one time, Fairmont owned the Condominiums, the Chalets, and the Recreational Vehicle Park, and provided water service as part of one entity. In the separation of the various components of the resort, parties variously entered into agreements regarding the continued delivery of water through the Fairmont distribution system. Fairmont asserted that it would be unfair to require Fairmont to repay these funds made as part of the voluntary agreements. Fairmont agreed not to charge further fees and to forego payment of any charges not yet paid. Fairmont stated that it had not charged to produce a profit but to defray maintenance and upkeep costs.

12. The Commission finds that Fairmont had a reasonable good faith belief that it had not been operating as a public utility. Admittedly, Fairmont pushed the envelope on this belief (history in Docket incorporated in Order No. 6162) and challenged a number of the Commission's letters and assertions on the subject before the Commission issued its compliance order. Nevertheless, Fairmont has, since the compliance order, made a concerted effort to comply with all the procedural requirements at the Commission. In addition, Fairmont had foregone all rates and charges for one year from May 1999 to May 2000, when the Commission issued the Final Order approving the rates and charges, as well as payments for charges made and not collected before May 1999.

13. Finally, although the fees and charges were not properly made pursuant to public utility law, the Commission determines that prior payments were made for services actually rendered and a commodity delivered. The recipients had value for their consideration. It would be unfair to require Fairmont to reimburse for these payments. Fairmont has already suffered consequences for its discriminatory treatment in charging some but not all of those receiving water, but it did have a good faith belief in the reasons for the discrimination, i.e., agreements in place. If Fairmont had continued to resist compliance with its public utility obligations, the Commission's remedy would have been to file a complaint in district court. See, § 69-3-110, Montana Code Annotated (MCA). Because Fairmont has complied, the Commission determines that there is good reason to grant its Motion for Reconsideration.

**Conclusions of Law**

1. Fairmont provides public water service within the state of Montana, and as such is a "public utility" within the meaning of § 69-3-101, MCA.

2. The Montana Public Service Commission properly exercises jurisdiction over Fairmont's rates and charges pursuant to Title 69, Chapter 3, MCA. § 69-3-102, MCA.

3. The Commission has the general power to do all things necessary and convenient in the exercise of the powers conferred on it by Title 69, Chapter 3, MCA. § 69-3-103, MCA.

**ORDER**

THEREFORE, THE MONTANA PUBLIC SERVICE COMMISSION ORDERS THAT:

Fairmont's Motion for Reconsideration of the portion of Order No. 6162 ordering a refund of payments made before May 10, 1999, is hereby GRANTED. This Order on Reconsideration is granted, *nunc pro tunc*, effective on the date of the Final Order Approving Initial Rates, and incorporated therein, as if it had been addressed in the Final Order.

DONE IN OPEN SESSION at Helena, Montana this 19th day of September 2000, by a 5-0 vote.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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DAVE FISHER, Chairman

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NANCY MCCAFFREE, Vice Chair

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BOB ANDERSON, Commissioner

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GARY FELAND, Commissioner

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BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson  
Commission Secretary

(SEAL)

NOTE:      You may be entitled to judicial review in this matter. Judicial review may be obtained by filing a petition for review within thirty (30) days of the service of this order. Section 2-4-702, MCA.